

Supreme Court, U.S.
FILED

OCT 28 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ARA SERVICES, INC.,

Petitioner,

v.

SOUTH CAROLINA TAX COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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Petitioner prays that a writ of certiorari issue to review the judgement herein of the South Carolina Supreme Court in the above entitled case handed down on June 5, 1978, petition for rehearing denied on July 31, 1978.

OPINION BELOW

The order of the court below was handed down June 5, 1978, petition for rehearing denied on July 31, 1978 and remittitur entered as of that date. These Orders are appended hereto, *infra* at p. 2-A. The case is officially reported in S.C. . . ., 246 S.E. 2d 171 (1978).

JURISDICTION

The final order of the South Carolina Supreme Court was entered on July 31, 1978, and is appended hereto, *infra* at p. 6-A. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

- I. DID THE IMPOSITION OF THE SALES AND USE TAXES BY THE SOUTH CAROLINA TAXING AUTHORITY ON THE FEDERALLY SUPPORTED SUMMER LUNCH PROGRAM FOR CHILDREN VIOLATE THE CONSTITUTIONAL PRINCIPLE OF THE FEDERAL GOVERNMENT'S IMMUNITY FROM TAXATION BY THE STATES?
- II. DID THE SOUTH CAROLINA SUPREME COURT'S FAILURE TO REMAND TO THE TRIER OF THE FACT THE QUESTION OF WHETHER THE TAXPAYER WAS NEGLIGENT IN FAILING TO REMIT THE TAX VIOLATE THE TAXPAYER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision involved is the Fourteenth Amendment to the United States Constitution, the pertinent portion of which is as follows:

. . . nor shall any state deprive any person of life, liberty or property, without due process of law.

STATUTE AND REGULATIONS INVOLVED

The statute involved is Section 13 of the National School Lunch Act (42 U.S.C.A. 1751, et seq., as amended, and the Department of Agriculture Regulations promulgated pursuant thereto, 7 C.F.R. 225 et seq.). Because the statute and regulation provisions are lengthy, their pertinent text is set forth as Appendix C, p. 9-A.

STATEMENT OF THE CASE

ARA, during the years in question, sold meals in South Carolina in connection with federally supported summer lunch programs for children. These summer lunch programs were one of a number of programs established by the Department of Agriculture pursuant to Section 13 of the *National School Lunch Act*, 42 U.S.C.A. §1751, et. seq., as amended, for the purpose of assisting states and local body politics through grants-in-aid and other means, to initiate, maintain, or expand food service programs for children.

The Department of Agriculture, through its Child Nutritional Regional Office in Atlanta, Georgia, upon application, entered into contracts with various "service institutions" or "sponsors" in South Carolina. 7 C.F.R. 225.7b(e).

In establishing their programs, the local sponsors were given the option of either preparing the meals themselves or hiring a "food management service company" or "caterer" to prepare these meals.

ARA was hired as the caterer in each of the instances in question. The sponsors would pay ARA directly for the meals and file a claim for reimbursement with the federal government.

From the time assessment, it was ARA's position that there were actually two sales of the meals — one from ARA to the sponsor, and one from the sponsor to the consuming children and the federal government. Alternatively, ARA argued that if there was but one sale of the meal, it was from ARA to the federally support program and imposition of such a tax would result in the unconstitutional levy of tax by the taxing authority on a federally supported program. This argument was raised in the protest by ARA to the South Carolina Tax Commission and formed the basis of the Second Cause of Action of the Complaint. The Trial Court did not reach this latter issue because it found that as a wholesaler,

ARA was not liable for the tax, but the Appellant in the South Carolina Supreme Court raised this position as Additional Sustaining Ground II. The only mention of the South Carolina Supreme Court in its opinion to this assertion was that:

.... ARA has submitted to the court these additional sustaining grounds. The case was tried by the lower court on stipulations which are included in the record before us. A careful examination of the stipulations convinces us that the lower court would not have been justified in granting relief to ARA on the basis of any of the sustaining grounds enumerated.

The Appellant again raised the constitutional argument in light of the finding of the Supreme Court as Ground II in the petition for Rehearing. This petition was denied without comment.

In addition to the tax, excess interest and penalties were assessed pursuant to section 12-35-1340 of the Code of Laws of South Carolina 1970.

In its Fourth Cause of Action in its refund action, ARA asserted:

That if an additional tax is found to be due, that the plaintiff's (ARA) failure to pay such tax was not result of any negligence on its part, and pursuant to Section 65-1458 of the 1962 South Carolina Code of Laws, as amended, the \$5480.50 in penalties paid should be refunded and the interest reduced accordingly.

Because it found that no tax was due and owing, the trial court did not, of course, specifically reach the issue of whether the ARA was negligent in failing to remit the tax. After the South Carolina Supreme Court reversed, the taxpayer filed a petition for rehearing, the fourth ground of which provided in pertinent part, as follows:

That to charge ARA with the excess interest rate and penalties, a finding of fact is required that the taxpayer filed its returns negligently and in bad faith, and the record is totally void of any evidence to support such a finding and the trial court did not so hold;

That section 12-35-1340 is penal in nature and its nature and its provisions should not be enforced without a full hearing and review by the Court; that section 12-35-1440 expressly provides for a review by the Court as to the merits of any tax or *penalty* (emphasis ours) assessed which, at least, we submit, should require this Court to remand the matter to the lower Court for express findings relative to such penalties and excess interest charges.

This petition was denied without comment.

REASONS FOR GRANTING THE WRIT

I

The sales and use tax levied on sales to the summer lunch program imposes an unconstitutional burden on those federally supported programs and is therefore, not in accord with the constitutional principles of immunity from taxation and the decisions of this Court.

ARA contended, and the trial court found the ARA was a wholesaler, and, therefore, not liable for sales or use taxes under the laws of South Carolina. This was based on a finding by the trial court that there were two sales of the meals — one from ARA to the sponsor, the second from the sponsor to the federal government and the consuming children.

The South Carolina Supreme Court, however, ignored the form of the transaction and held that because the summer lunch programs were nothing more than "give away" programs, there was only one sale of the meal. Under this char-

acterization, ARA was found to be a retailer who supplied the meals to ultimate consumer. The record clearly established that the purchase price for the meals came from the Department of Agriculture. Moreover, the record also contained evidence that the purchasing sponsors received food donated by the United States Department of Agriculture, were obligated to make available their records for inspection by the federal government, and warranted to follow all mandate of the federal authorities regarding the handling of these programs. In addition, the contracts between ARA and the Sponsor did not become effective until the U. S. Department of Agriculture approved the sponsor and in turn, the sponsor forwarded this certification to ARA.

Based on these facts, it is clear that the South Carolina Supreme Court determined that for purposes of this program the sponsors and the federal government were one — i.e., that the sponsors were the purchasing agents of the federal government. This relationship was implicitly recognized by the South Carolina Supreme Court when it found that "the last transaction for a consideration involved ARA as vendor and the sponsor as vendees."

Although ARA disagrees with this characterization of the transaction, it nevertheless is the ruling of that Court. The basis of this petition for certiorari is not this finding, however, but the Court's failure to apply the constitutional doctrine of intergovernmental immunity from taxation to its opinion of the nature of the transaction. ARA consistently argued from the time of the first hearing before the Sales and Use Tax Division of South Carolina Tax Commission that if there was but one transfer of the meals, the imposition of a sales or use tax on such sales would result in unconstitutional levy of state tax on a federally supported program.

It has been well established since the early days of our history that the federal government is constitutionally immune

from taxation by the states in proper cases. *McCullough v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579. This doctrine has developed to the point if the legal incidence of the tax is on the federal government, the state is barred from attempting to collect it. See *Kern-Limerick, Inc. v. Surlock*, 374 U. S. 403 (1954).

Although the burden of the South Carolina Sales tax is technically on the vendor, the Court has recognized that if the tax is one which by its terms must be passed on to the purchaser, the legal incidence of tax is on the purchaser. See *First National Bank v. State Tax Comm.*, 392 U. S. 339 (1968); *Federal Land Bank of St. Paul v. Bismarck*, 314 U. S. 94 (1941). In the present situation, the contract with the sponsor specifically provided that "in the event that the sale of any food items contracted for herein are held subject to any local or state sales tax, the amount of such sales tax shall be added to the invoice and billed to the purchaser." This clearly shifted the legal responsibility for the tax to the sponsors, because the South Carolina Supreme Court found that the sponsors and the U. S. Department of Agriculture were one in the same for the purposes of applying the S. C. Sales and Use Tax law and because they are legally responsible for tax under their contract, the imposition of a sales and use tax on these sales by South Carolina resulted in an unconstitutional imposition of tax on the federally supported program. Although there is language in *United States v. Boyd*, 318 U. S. 39 (1964) to the effect that a contract for payment of the product by the federal government is not sufficient to immunize the sale from tax, in that case and in those cited therein, the federal government was liable for the tax under the general reimbursement provisions of the contract. In the present case, however, there was a separate and distinct assumption of the tax liability conditioned on a tax being assessed. The sponsor (and federal government under the South Carolina Supreme Court ruling) expressly assumed

legal responsibility for the tax. Therefore, because both the economic burden and legal responsibility fell on the federally supported program, these meal sales were covered by the intergovernmental immunity doctrine from taxation.

II

By failing to remand to the trier of fact the question of whether ARA was negligent in failing to pay the tax, the South Carolina Supreme Court denied ARA of its right to be heard on this issue and deprived ARA of due process of law as guaranteed by the Fourteenth Amendment of the Constitution.

It is elementary that the Fourteenth Amendment of the Constitution requires the states to give a defendant in a civil suit "an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U. S. 377, 379 (1971). As this Court has stated, "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

Under South Carolina law, a taxpayer is liable for excess interest at a rate of one percent per month and a five percent penalty if "the understatement is due to negligence on the part of the taxpayer." (S. C. Code § 12-35-1340).

If however, return "was made in good faith and the understatement of the tax was not due to any fault of the taxpayer," no penalty is added and interest is imposed at the rate of one half of one percent. (S. C. Code § 12-35-1340). The Tax Commission assessed excess interest and penalties against the taxpayer in this suit. Because the trial court found that the entire tax was erroneously assessed and collected, it did not, of course, reach the issue of whether or not ARA acted in good faith or was negligent in failing to remit the tax. Parenthetically, it could well be assumed that since the Trial Judge held that the Tax Commission was in error in the assessment, that the Court would have found the taxpayer was not negligent and had obviously exercised good faith. The

South Carolina Supreme Court, however, in reversing the decision of the trial court, imposed the excess interest and penalties in addition to the tax.

Under Article V, section 5 of the Constitution of South Carolina, the state Supreme Court in a law case is only given jurisdiction to correct errors of law. Findings of fact will not be disturbed unless the review of the record discloses that there is no evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S. C. 81, 221 S.E. 2d 773 (1976).

Because the trier of fact did not address the fact issue of whether ARA was negligent in failing to remit a tax if one was owed and because jurisdiction of the South Carolina Supreme Court is limited to review errors of laws, the Court should have remanded the question of the ARA's negligence to the trial court. ARA was not given an opportunity to be heard on this issue and, therefore, ARA's property, to the extent of the excess interest and penalties, was taken without due process of law.

CONCLUSION

For the reasons cited above, the petition for certiorari should be granted.

Respectfully submitted
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APPENDICES

APPENDIX A
 THE STATE OF SOUTH CAROLINA
 In The Supreme Court

ARA Services, Inc., *Respondent,*
 v.
 South Carolina Tax Commission, *Appellant.*

Appeal From Greenville County
 James H. Price, Jr., *Judge*

Opinion No. 20704
 Filed June 5, 1978

REVERSED

Attorney General Daniel R. McLeod, Deputy Attorney General Joe L. Allen, Jr., and Assistant Attorneys General G. Lewis Argoe, Jr., and John C. von Lehe, all of Columbia, *for appellant.*

W. Francis Marion, of Haynsworth, Perry, Bryant, Marion & Johnstone, of Greenville, *for respondent.*

LITTLEJOHN, A. J.: The appellant, South Carolina Tax Commission, assesses ARA Services, Inc. (ARA) \$167,396.45 for sales taxes alleged to be due under § 65- Code of Laws of South Carolina (1962)¹. This amount, representing taxes,

interest, penalty and license fees, was paid under protest by ARA, which then brought this action pursuant to §§ 65-1466, 65-1467, and 65-2661 and 65-2662² of the 1962 *Codes as Amended* (Supp. 1975). These Code sections permit a taxpayer to pay contested items under protest and then sue for recovery of the amount paid.

The South Carolina Sales Tax Law requires sellers at retail to collect and pay to the State a 4% sales tax. It does not require that sales tax be paid by wholesalers. The question for determination by the court is whether the sales involved were made at retail or at wholesale. The lower court held that ARA's transactions were wholesale sales and ordered the Tax Commission to refund the money paid under protest. The Commission has appealed, asserting that the lower court should have denominated ARA's transactions retail sales rather than wholesale sales.

The facts upon which our determination must hinge are not in dispute. During the years in question (February 1, 1972, to August 31, 1975), ARA sold meals in this State to fourteen eleemosynary-type organizations, called sponsors, which conducted federally supported summer lunch programs for indigent children. The programs were among those established by the Department of Agriculture pursuant to § 13 of the National School Lunch Act, 42 U.S.C.A., §1751, *et seq.*, as amended, for the purpose of assisting states and local body politics through grants-in-aid and other means, to initiate, maintain, or expand food service programs for children.

ARA entered into a written contract with each of the local sponsors which were referred to in the contracts as "purchasers." The preamble of the contract stipulated that "... purchaser is desirous of purchasing meals for consumption by children under the Special Summer Service Program for Children of the United States Department of Agriculture. . . ."

¹Now codified as § 12-35-510 (1976).

²Now codified as § 12-35-1430 and 12-35-1440.

(Emphasis added.) No federal agency was a party to the contract. The Department of Agriculture entered into a separate reimbursement contract with the local sponsors. The reimbursement agreement was for an amount more than that paid by the sponsor to ARA.

The contracts between ARA and the sponsors provided as follows: "Billing shall be made monthly and *purchaser will pay* such billings within ten (10) days of the invoice date." (Emphasis added.)

South Carolina Code § 12-35-510 (1976) imposes a sales tax:

"... upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character...."

We think that the lower court erred in holding that "... ARA's sales were sales at wholesale and that . . . the sales tax was erroneously assessed." It was the reasoning of the lower court that: "The sponsor, in turn, sold the meals to the consuming children or to the federal agency through a program of reimbursement."

The meals were never sold by the sponsors to the children. The entire record indicates that everyone involved knew that this was a give-away program. Even though the sponsors could have charged the children, Mr. Dennis of the Department of Agriculture testified that he did not remember any child ever having paid anything for meals provided by the summer lunch programs in South Carolina between 1972 and 1975. ARA's Mr. Koester testified as follows:

"Q. At the time of the signing that receipt who becomes liable for the payment of that lunch?

"A. In our opinion the sponsor that we've contracted to provide the lunches for.

"Q. Do you receive any check whatsoever from the federal government?

"A. No, we don't."

It is apparent that no sale was ever contemplated or was ever made by the sponsors to either the children or the Department of Agriculture. Accordingly, the last transaction for a consideration involved ARA as vendor and the sponsors as vendees. Code § 12-35-170 defines "wholesale sale" and "sale at wholesale" as follows:

"The terms *wholesale sale* and *sale at wholesale* mean a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers *for resale*, and do not include a sale by wholesalers to users or consumers, not for resale." (Emphasis added.)

ARA argues that there were two distinct sales of the meals. It is maintained that ARA sold the meals to the sponsors, who in turn sold the meals to the children, and that the consideration for the sale from the sponsors to the children was provided by the Department of Agriculture. We are of the opinion that the fact that the Department of Agriculture reimbursed the sponsors for their costs does not convert the giving of meals from the sponsors to the children into a sale. The Department of Agriculture never owned the meals, and the sponsors were obligated to pay for them regardless of whether they were ever reimbursed by the Department.

The facts in this case are unlike those in *Slater v. South Carolina Tax Commission*, . . . S. C. . . ., 242 S.E.2d 439 (1978). There, meals were purchased from Slater, a subsidiary of ARA, for resale to students at colleges. The meals were then actually resold to the students who paid the colleges for them. Accordingly, Slater's sale to the colleges was not the last transfer of the meals for consideration, and thus were wholesale transactions.

ARA has submitted to the court three additional sustaining grounds. The case was tried by the lower court on stipulations which are included in the record before us. A careful examination of the stipulations convinces us that the lower court would not have been justified in granting relief to ARA on the basis of any of the sustaining grounds enumerated.

APPENDIX B

The lower court should have dismissed the complaint, and the order that court is

REVERSED.

LEWIS, C. J., RHODES and GREGORY, J. J., concur.
NESS, A. J., dissents.

NESS, A. J. (Dissenting):

Believing the trial court correctly characterized ARA as a wholesaler, I dissent.

Initially, the sponsors were given the option of either preparing the meals or hiring a caterer. They elected to contract with ARA and paid respondent for the lunches. The sponsors transferred the boxed lunches to the children and then received consideration from the U. S. Department of Agriculture. Accordingly, two distinct sales or transfers of the meals transpired.

In each instance, the payment from the USDA to the sponsor was greater than the amount charged the sponsor by ARA, reflecting costs attributable to the sponsor's serving of the meals to the children. This payment flowing from the federal government to the sponsor was the consideration for the second transfer sale of the meals to the children. Therefore, ARA's transfer of the lunches to sponsor was a sale for resale.

The majority rests its conclusion on the fact the meals

were never "sold" by the sponsors to the children. In this way, the majority seeks to distinguish the case from our recent decision in *Slater Corporation v. S. C. Tax Commission*, ... S. C. ..., 242 S. E. 2d 439 (1978).

I believe the two cases are strikingly similar. In *Slater*, the colleges purchased the meals from Slater, a subsidiary of ARA, and the students, in turn purchased the meals from the colleges. In each instance, as here, the student paid the colleges more for the meals than the colleges paid Slater, reflecting costs incurred by the school in serving the food.

In this case, it is irrelevant that the consideration for the second transfer did not flow directly from the children. In *Slater*, the fact that a college may have received payment for the student's meals from a source other than the student himself (i.e., parents, a scholarship fund, etc.) would not have altered Slater's status as a wholesaler.

The critical consideration is that two sales were involved in each. According to Code Section 12-35-100, a "sale" is:

"Any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property . . ." (Emphasis supplied).

Therefore, it is not necessary for the consumer to give consideration in order for a sale to transpire; it is sufficient if consideration is provided a third party in the consumer's behalf.

This is not a situation where ARA sold the meals to the sponsor and sponsor then gave the meals away without receiving consideration from any source. In this case there were two distinct sales pursuant to Code Section 12-35-100 and two distinct considerations passing.

I conclude ARA sold the lunches to the sponsors for

resale as the sponsors received payment from the USDA when they transferred the meals to the children. I would affirm the order of the trial judge refunding the taxes paid under protest, with interest.

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.
 s/ Bruce Littlejohn A.J.
 s/ Wm. L. Rhodes, Jr. A.J.
 s/ George T. Gregory, Jr. A.J.

Petition granted.

s/ J. B. Ness A.J."

The remittitur is being sent down today.

APPENDIX C

§ 1761. Summer food service programs for children in service institutions

Assistance to States; definitions; facilities to be used; eligible service institutions; order of priority in participation; assistance to rural area eligible service institutions to participate in programs; reimbursement of camps, limitation

(a)(1) The Secretary is authorized to carry out a program to assist States, through grants-in-aid and other means, to initiate, maintain, and expand nonprofit food service programs for children in service institutions. For purposes of this section, (A) "program" means the summer food service program for children authorized by this section; (B) "service institutions" means nonresidential public or private nonprofit institutions, and residential public or private nonprofit summer camps, that develop special summer or school vacation programs providing food service similar to that made available to children during the school year under the school lunch program under this chapter or the school breakfast program under the Child Nutrition Act of 1966; (C) "areas in which poor economic conditions exist" means areas in which at least 33½ percent of the children are eligible for free or reduced price school meals under this chapter and the Child Nutrition Act of 1966, as determined by information provided from departments of welfare, zoning commissions, census tracts, by the number of free and reduced price lunches or breakfasts served to children attending public and nonprofit private schools located in the area of program food service sites, or from other appropriate sources, including statements of eligibility based upon income for children enrolled in the program; (D) "children" means individuals who are eighteen years of

age and under, and individuals who are older than eighteen who are (i) determined by a State educational agency or a local public educational agency of a State, in accordance with regulations prescribed by the Secretary, to be mentally or physically handicapped, and (ii) participating in a public school program established for the mentally or physically handicapped; and (E) "State" means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

(2) To the maximum extent feasible, consistent with the purposes of this section, any food service under the program shall use meals prepared at the facilities of the service institution or at the food service facilities of public and nonprofit private schools. The Secretary shall assist States in the development of information and technical assistance to encourage increased service of meals prepared at the facilities of service institutions and at public and nonprofit private schools.

(3) Eligible service institutions entitled to participate in the program shall be limited to those that—

(A) demonstrate adequate administrative and financial responsibility to manage an effective food service;

(B) have not been seriously deficient in operating under the program;

(C) either conduct a regularly scheduled food service for children from areas in which poor economic conditions exist or qualify as camps; and

(D) provide an ongoing year-round service to the community to be served under the program (except that an otherwise eligible service institution shall not be disqualified for failure to meet this requirement for ongoing year-round service if the State determines that its disqualification would result in an area in which poor economic conditions exist not being served or in a significant number of needy children not having reasonable access to a summer food service program).

(4) The following order of priority shall be used by the State in determining participation where more than one eligible service institution proposes to serve the same area:

(A) local schools or service institutions that have demonstrated successful program performance in a prior year;

(B) service institutions that prepare meals at their own facilities or operate only one site;

(C) service institutions that use local school food facilities for the preparation of meals;

(D) other service institutions that have demonstrated ability for successful program operation; and

(E) service institutions that plan to integrate the program with Federal, State, or local employment programs.

The Secretary and the States, in carrying out their respective functions under this section, shall actively seek eligible service institutions located in rural areas, for the purpose of assisting such service institutions in applying to participate in the program.

(5) Camps that satisfy all other eligibility requirements of this section shall receive reimbursement only for meals served to children who meet the eligibility requirements for free or reduced price meals, as determined under this chapter and the Child Nutrition Act of 1966.

Payments to service institutions; food service operations costs; adjustments in maximum reimbursement levels; meals per day limitation; budget for administrative costs; submittal and approval by State; administrative cost payments; maximum allowable levels; study of food service operations and administrative costs; report to Congress

(b)(1) Payments to service institutions shall equal the full cost of food service operations (which cost shall include the cost of obtaining, preparing, and serving food, but shall not include administrative costs), except that such payments to any institution shall not exceed (1) 85.75 cents for each lunch and supper served; (2) 47.75 cents for each breakfast served; or (3) 22.50 cents for each meal supplement served: *Provided*, That such amounts shall be adjusted each January 1, to the nearest one-fourth cent in accordance with the changes for the twelve-month period ending the preceding November 30 in the series for food away from home of the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor: *Provided further*, That the Secretary may make such adjustments in the maximum reimbursement levels as the Secretary determines appropriate after making the study prescribed in paragraph (4) of this subsection.

(2) Any service institution shall be permitted to serve up to three meals per day of operation if at least one of the three meals is a meal supplement, and any service institution that is a camp shall be permitted to serve up to four meals per day of operation, if the service institution has the administrative capability, and the food preparation and food holding capabilities (where applicable), to manage more than one meal service per day, and if the service period of different meals does not coincide or overlap. Such meals may include a breakfast, a lunch, a supper, and meal supplements.

(3) Every service institution, when applying for participation in the program, shall submit a complete budget for administrative costs related to the program, which shall be subject to approval by the State. Payment to service institutions for administrative costs shall equal the full amount of State approved administrative costs incurred, except that such payment to service institutions may not exceed the maximum allowable levels determined by the Secretary pursuant to the study prescribed in paragraph (4) of this subsection.

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(4)(A) The Secretary shall conduct a study of the food service operations carried out under the program. Such study shall include, but shall not be limited to—

- (i) an evaluation of meal quality as related to costs; and
- (ii) a determination whether adjustments in the maximum reimbursement levels for food service operation costs prescribed in paragraph (1) of this subsection should be made, including whether different reimbursement levels should be established for self-prepared meals and vended meals and which site-related costs, if any, should be considered as part of administrative costs.

(B) The Secretary shall also study the administrative costs of service institutions participating in the program and shall thereafter prescribe maximum allowable levels for administrative payments that reflect the costs of such service institutions, taking into account the number of sites and children served, and such other factors as the Secretary determines appropriate to further the goals of efficient and effective administration of the program.

(C) The Secretary shall report the results of such studies to Congress not later than December 1, 1977.

**Payments for meals served during May through September:
exceptions for continuous school calendars**

(c) Payments shall be made to service institutions only for meals served during the months of May through September, except in the case of service institutions that operate food service programs for children on school vacation at any time under a continuous school calendar.

**Advance program payments to States for monthly meal service:
letters of credit, forwarding to States; determination
of amount; valid claims, receipt**

(d) Not later than April 15, May 15, and July 1, of each year, the Secretary shall forward to each State a letter of credit (advance program payment) that shall be available to each State for the payment of meals to be served in the month for which the letter of credit is issued. The amount of the advance program payment shall be an amount which the State demonstrates, to the satisfaction of the Secretary, to be necessary for advance program payments to service institutions in accordance with subsection (e) of this section. The Secretary shall also forward such advance program payments, by the first day of the month prior to the month in which the program will be conducted, to States that operate the program in months other than May through September. The Secretary shall forward any remaining payments due pursuant to subsection (b) of this section not later than sixty days following receipt of valid claims therefor.

42 § 1761 PUBLIC HEALTH AND WELFARE Ch. 13

**Advance program payments to service institutions for monthly meal service;
certification of personnel training sessions; minimum days per month
operations requirement; payments; computation, limitation; valid claims,
receipt; withholding; demand for repayment; subtraction of disputed
payments**

(e)(1) Not later than June 1, July 15, and August 15 of each year, or, in the case of service institutions that operate under a continuous school calendar, the first day of each month of operation, the State shall forward advance program payments to each service institution: *Provided*, That (A) the State shall not release the second month's advance program payment to any service institution that has not certified that it has held training sessions for its own personnel and the site personnel with regard to program duties and responsibilities, and (B) no advance program payment may be made for any month in which the service institution will operate under the program for less than ten days.

(2) The amount of the advance program payment for any month in the case of any service institution shall be an amount equal to (A) the total program payment for meals served by such service institution in the same calendar month of the preceding calendar year, (B) 50 percent of the amount established by the State to be needed by such service institution for meals if such service institution contracts with a food service management company, or (C) 65 percent of the amount established by the State to be needed by such service institution for meals if such service institution prepares its own meals, whichever amount is greatest: *Provided*, That the advance program payment may not exceed the total amount estimated by the State to be needed by such service institution for meals to be served in the month for which such advance program payment is made or \$40,000, whichever is less, except that a State may make a larger advance program payment to such service institution where the State determines that such larger payment is necessary for the operation of the program by such service institution and sufficient administrative and management capability to justify a larger payment is demonstrated. The State shall forward any remaining payment due a service institution not later than seventy-five days following receipt of valid claims. If the State has reason to believe that a service institution will not be able to submit a valid claim for reimbursement covering the period for which an advance program payment has been made, the subsequent month's advance program payment shall be withheld until such time as the State has received a valid claim. Program payments advanced to service institutions that are not subsequently deducted from a valid claim for reimbursement shall be repaid upon demand by the State. Any prior payment that is under dispute may be subtracted from an advance program payment.

Nutritional standards; free cost meals to children in approved institutions; camp services, charges for meals to ineligible children; quality assurance, model specifications and standards; meal preparation contracts, requirements; inspection and testing

(f) Service institutions receiving funds under this section shall serve meals consisting of a combination of foods and meeting minimum nutritional standards prescribed by the Secretary on the basis of tested nutritional research. Such meals shall be served without cost to children attending service institutions approved for operation under this section, except that, in the case of camps, charges may be made for meals served to children other than those who meet the eligibility requirements for free or reduced price meals in accordance with subsection (a)(5) of this section. To assure meal quality, States shall, with the assistance of the Secretary, prescribe¹ model meal specifications and model food quality standards, and ensure that all service institutions contracting for the preparation of meals with food service management companies include in their contracts menu cycles, local food safety standards, and food quality standards approved by the State. Such contracts shall require (A) periodic inspections, by an independent agency or the local health department for the locality in which the meals are served, of meals prepared in accordance with the contract in order to determine bacteria levels present in such meals, and (B) that bacteria levels conform to the standards which are applied by the local health authority for that locality with respect to the levels of bacteria that may be present in meals served by other establishments in that locality. Such inspections and any testing resulting therefrom shall be in accordance with the practices employed by such local health authority.

Regulations, guidelines, applications, and handbooks; publication; startup costs

(g) The Secretary shall publish proposed regulations relating to the implementation of the program by November 1 of each fiscal year, final regulations by January 1 of each fiscal year, and guidelines, applications, and handbooks by February 1 of each fiscal year: *Provided*, That for fiscal year 1978, those portions of the regulations relating to payment rates for both food service operations and administrative costs need not be published until December 1 and February 1, respectively. In order to improve program planning, the Secretary may provide that service institutions be paid as startup costs not to exceed 20 percent of the administrative funds provided for in the administrative budget approved by the State under subsection (b)(3) of this section. Any payments made for startup costs shall be subtracted from amounts otherwise payable for administrative costs subsequently made to service institutions under subsection (b)(3) of this section.

Direct disbursement to service institutions by Secretary

(h) Each service institution shall, insofar as practicable, use in its food service under the program foods designated from time to time by

the Secretary as being in abundance. The Secretary is authorized to donate to States, for distribution to service institutions, food available under section 1431 of Title 7, or purchased under section 612c of Title 7 or section 1446a-1 of Title 7. Donated foods may be distributed only to service institutions that can use commodities efficiently and effectively, as determined by the Secretary.

Administration of program by Secretary, in event of nonadministration by State, and direct disbursement to service institutions; notification

(i) If any State (1) is unable for any reason to disburse the funds otherwise payable to it under this section, or (2) does not operate the program in accordance with the requirements of this section, the Secretary shall assume authority for administration of the program in such State, and shall disburse the funds directly to service institutions in the State for the same purposes and subject to the same conditions as are required of a State disbursing funds made available under this section. In cases described in clause (1) of the preceding sentence, the State shall notify the Secretary, not later than January 1 of each fiscal year in which the program is operated, of its intention not to administer the program.

Administrative expenses of Secretary; authorization of appropriations

(j) Expenditures of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under this section.

Administrative costs of State; payment; adjustment; standards and effective dates, establishment; funds; withholding, inspection

(k)(1) The Secretary shall pay to each State for its administrative costs incurred under this section in any fiscal year an amount equal to (A) 20 percent of the first \$50,000 in funds distributed to that State for the program in the preceding fiscal year; (B) 10 percent of the next \$50,000 in funds distributed to that State for the program in the preceding fiscal year; (C) 5 percent of the next \$100,000 in funds distributed to that State for the program in the preceding fiscal year; and (D) 2 percent of any remaining funds distributed to that State for the program in the preceding fiscal year: *Provided*, That such amounts may be adjusted by the Secretary to reflect changes in the size of that State's program since the preceding fiscal year.

(2) The Secretary shall establish standards and effective dates for the proper, efficient, and effective administration of the program by the State. If the Secretary finds that the State has failed without good cause to meet any of the Secretary's standards or has failed without good cause to carry out the approved State management and administration plan under subsection (n) of this section, the Secretary may withhold from the State such funds authorized under this subsection as the Secretary determines to be appropriate.

(3) To provide for adequate nutritional and food quality monitoring, and to further the implementation of the program, an additional

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amount, not to exceed the lesser of actual costs or 1 percent of program funds, shall be made available by the Secretary to States to pay for State or local health department inspections, and to reinspect facilities and deliveries to test meal quality.

Food service management companies; subcontracts; assignments, conditions and limitations; meal capacity information in bids subject to review; registration; record, availability to States; small and minority-owned businesses for supplies and services; contracts; standard form, bid and contract procedures, bonding requirements and exemption, review by States, collusive bidding safeguards

(l) (1) Service institutions may contract on a competitive basis only with food service management companies registered with the State in which they operate for the furnishing of meals or management of the entire food service under the program, except that a food service management company entering into a contract with a service institution under this section may not subcontract with a single company for the total meal, with or without milk, or for the assembly of the meal. The Secretary shall prescribe additional conditions and limitations governing assignment of all or any part of a contract entered into by a food service management company under this section. Any food service management company shall, in its bid, provide the service institution information as to its meal capacity. The State shall, upon award of any bid, review the company's registration to calculate how many remaining meals the food service management company is equipped to prepare.

(2) Each State shall provide for the registration of food service management companies. For the purposes of this section, registration shall include, at a minimum—

- (A) certification that the company meets applicable State and local health, safety, and sanitation standards;
- (B) disclosure of past and present company owners, officers, and directors, and their relationship, if any, to any service institution or food service management company that received program funds in any prior fiscal year;
- (C) records of contract terminations or disallowances, and health, safety, and sanitary code violations, in regard to program operations in prior fiscal years; and
- (D) the addresses of the company's food preparation and distribution sites.

No food service management company may be registered if the State determines that such company (i) lacks the administrative and financial capability to perform under the program, or (ii) has been seriously deficient in its participation in the program in prior fiscal years.

(3) In order to ensure that only qualified food service management companies contract for services in all States, the Secretary shall maintain a record of all registered food service management companies and their program record for the purpose of making such information available to the States.

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(4) In accordance with regulations issued by the Secretary, positive efforts shall be made by service institutions to use small businesses and minority-owned businesses as sources of supplies and services. Such efforts shall afford those sources the maximum feasible opportunity to compete for contracts using program funds.

(5) Each State, with the assistance of the Secretary, shall establish a standard form of contract for use by service institutions and food service management companies. The Secretary shall prescribe requirements governing bid and contract procedures for acquisition of the services of food service management companies, including, but not limited to, bonding requirements (which may provide exemptions applicable to contracts of \$100,000 or less), procedures for review of contracts by States, and safeguards to prevent collusive bidding activities between service institutions and food service management companies.

Accounts and records

(m) States and service institutions participating in programs under this section shall keep such accounts and records as may be necessary to enable the Secretary to determine whether there has been compliance with this section and the regulations issued hereunder. Such accounts and records shall at all times be available for inspection and audit by representatives of the Secretary and shall be preserved for such period of time, not in excess of five years, as the Secretary determines necessary.

Management and administration plan; notification and submittal to Secretary; specific provisions

(n) Each State desiring to participate in the program shall notify the Secretary by January 1 of each year of its intent to administer the program and shall submit for approval by February 15 a management and administration plan for the program for the fiscal year, which shall include, but not be limited to, (1) the State's administrative budget for the fiscal year, and the State's plans to comply with any standards prescribed by the Secretary under subsection (k) of this section; (2) the State's plans for use of program funds and funds from within the State to the maximum extent practicable to reach needy children, including the State's methods for assessing need, and its plans and schedule for informing service institutions of the availability of the program; (3) the State's best estimate of the number and character of service institutions and sites to be approved, and of meals to be served and children to participate for the fiscal year, and a description of the estimating methods used; (4) the State's plans and schedule for providing technical assistance and training eligible service institutions; (5) the State's schedule for application by service institutions; (6) the actions to be taken to maximize the use of meals prepared by service institutions and the use of school food service facilities; (7) the State's plans for monitoring and inspecting service institutions, feeding sites, and food service management companies and for ensuring that such companies do not enter into con-

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tracts for more meals than they can provide effectively and efficiently; (8) the State's plan and schedule for registering food service management companies; (9) the State's plan for timely and effective action against program violators; (10) the State's plan for determining the amounts of program payments to service institutions and for disbursing such payments; (11) the State's plan for ensuring fiscal integrity by auditing service institutions not subject to auditing requirements prescribed by the Secretary; and (12) the State's procedure for granting a hearing and prompt determination to any service institution wishing to appeal a State ruling denying the service institution's application for program participation or for program reimbursement.

Violations and penalties

(o)(1) Whoever, in connection with any application, procurement, recordkeeping entry, claim for reimbursement, or other document or statement made in connection with the program, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, or whoever, in connection with the program, knowingly makes an opportunity for any person to defraud the United States, or does or omits to do any act with intent to enable any person to defraud the United States, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) Whoever being a partner, officer, director, or managing agent connected in any capacity with any partnership, association, corporation, business, or organization, either public or private, that receives benefits under the program, knowingly or willfully embezzles, misappropriates, steals, or obtains by fraud, false statement, or forgery, any benefits provided by this section or any money, funds, assets, or property derived from benefits provided by this section, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both (but, if the benefits, money, funds, assets, or property involved is not over \$200, then the penalty shall be a fine of not more than \$1,000 or imprisonment for not more than one year, or both).

(3) If two or more persons conspire or collude to accomplish any act made unlawful under this subsection, and one or more of such persons do any act to effect the object of the conspiracy or collusion, each shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Authorization of appropriations

(p) For the fiscal years beginning October 1, 1977, and ending September 30, 1980, there are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this section.

June 4, 1946, c. 281, § 13, as added May 8, 1968, Pub.L. 90-302, § 3, 82 Stat. 117, and amended May 14, 1970, Pub.L. 91-248, § 6(c), (d), 84

FILED

NOV 16 1978

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-712

ARA SERVICES, INC., PETITIONER,

versus

SOUTH CAROLINA TAX COMMISSION, RESPONDENT.

BRIEF OPPOSING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1978

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QUESTIONS PRESENTED

I. Was the tax imposed by the respondent, the state taxing authority, upon the petitioner, ARA, in violation of the constitutional principle that a state cannot subject to taxation the federal government or its instrumentalities?

II. Was the taxpayer denied due process of law under the Fourteenth Amendment to the Constitution upon the issuance by the State Supreme Court of its decision that the record supported a finding that the taxpayer was liable for negligence penalties under the state statutes?

ARGUMENT ON QUESTION I

THE TAXES IN ISSUE ARE IMPOSED UPON ARA AND NOT THE FEDERAL GOVERNMENT OR ITS INSTRUMENTALITIES; THERE IS THEREFORE NO QUESTION OF IMMUNITY UNDER THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THIS COURT.

ARA, the petitioner, is engaged in the business of preparing and selling prepared meals. Meals were sold upon which the tax is based to fourteen (14) eleemosynary-type organizations that were not federal agencies or instrumentalities. The organizations conducted summer lunch programs for indigent children and received financial support under the National School Lunch Act, 42 U. S. C. A. § 1751, et seq. This Act authorizes the Department of Agriculture to provide assistance to states that establish programs for children through the use of "service institutions" called sponsors by the State Supreme Court.

The following is set forth in the decision of the State Supreme Court and was not disputed:

"ARA entered into a written contract with each of the local sponsors which were referred to in the contracts as 'purchasers'. The preamble of the contract stipulated that '... purchaser is desirous of purchasing meals **for consumption by children** under the Special Summer Service Program for Children of the United States Department of Agriculture. . .' (Emphasis added.) No federal agency was a party to the contract. The Department of Agriculture entered into a separate reimbursement contract with the local sponsors. The reimbursement agreement was for an amount more than that paid by the sponsor to ARA. The contracts between ARA and the sponsors provided as follows: 'Billing shall be made monthly and **purchaser will pay** such billings within ten (10)

days of the invoice date.' (Emphasis added.)" (Page 3-A of Petition)

The State Supreme Court found that after the sponsors purchased the meals there was no sale of the meals either to the children or to the Department of Agriculture. It expressly held however that there was a contract between the Department and sponsors which was one of reimbursement.

"* * *. We are of the opinion that the fact that the Department of Agriculture reimbursed the sponsors for their costs does not convert the giving of meals from the sponsors to the children into a sale. The Department of Agriculture never owned the meals, and the sponsors were obligated to pay for them regardless of whether they were ever reimbursed by the Department." (Page 5-A of Petition)

Petitioner now states that the State Supreme Court determined that the sponsors and the federal government for the purpose of the lunch program were the same. Petitioner further says that the sponsors were agents of the federal government. The undisputed facts and the findings of the State Supreme Court set forth above from the record however directly contradict these statements.

The Brief of ARA in the State Supreme Court expressed its position on the issue raised in this petition regarding the legal incidence of the sales tax. We quote from ARA's Brief, pages 17 and 18 the following:

"The Appellant has asserted that under South Carolina law, the legal incidence of these taxes are on the vendor, rather than the purchaser, and that, therefore, a sale to a federally supported program does not fall within the immunity doctrine. With this assertion in reference to the sales tax portion of the assessment, ARA will agree."

It is well settled by the decisions of this Court that a state sales tax may be imposed upon a nonfederal taxpayer although the economic burden of the tax will ultimately be borne by the government. *Alabama v. King and Boozer*, 314 U. S. 1 (1941); *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954).

Respondent emphasizes in response to the cases *First National Bank v. State Tax Commission*, 392 U. S. 339 (1968); *Federal Land Bank of St. Paul v. Bismarck*, 314 U. S. 94 (1941), cited by petitioner, that the tax in issue is a sales tax. Since 1954 it has clearly been held to be a vendor tax upon sales at retail with no mandatory pass on. Provisions regarding pass on of the tax were made absolutely permissive by § 15(b) of Act #644 of the 1954 General Assembly of South Carolina. For comments on the history of the South Carolina Act, respondent would have the court read the dissenting opinion of District Judge Timmerman in the case *United States v. Livingston* (D. C. S. C.) 179 F. Supp. 9, aff'd 364 U. S. 281, rehearing denied 364 U. S. 855 (1959).

Also attached to this Brief as Appendix A is an opinion of the Comptroller General of the United States dated August 7, 1956, in which the sales tax law in question was held to be a vendor tax without any provision requiring a mandatory pass on.

Petitioner has also cited *United States v. Boyd*, 378 U. S. 51 (1964). *Boyd* upheld a tax on a contractor under the "legal incidence" test although the tax constituted an economic burden on the United States. From the case, we quote the rule.

"The Constitution immunizes the United States and its property from taxation by the States, *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, but it does not forbid a tax whose legal incidence is upon a contractor doing business with

the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (Page 44)

In *Boyd*, the contract between the contractor and the government was a cost-plus contract. On a cost-plus basis, the burden of the tax clearly fell upon the government. The Court further, in addition to holding that the legal incidence of the tax was on the contractor, refused to find that the contractor was incorporated into the government structure as to become an instrumentality of the government and enjoy immunity.

Respondent submits that the record of this case shows that the sponsors were not governmental instrumentalities or agents of a governmental instrumentality. Further, the tax on ARA, a contractor with the sponsors, does not violate the principles of constitutional immunity of the federal government from state taxation.

ARGUMENT ON QUESTION II

PETITIONER WAS AFFORDED THE RIGHT TO APPEAR AND DID APPEAR WITH REGARD TO THE PENALTY CLAIM HEREIN AT AN ADMINISTRATIVE HEARING, BEFORE THE TRIAL COURT OF SOUTH CAROLINA AND BEFORE THE STATE SUPREME COURT; DUE PROCESS OF LAW AS AFFORDED BY THE UNITED STATES CONSTITUTION HAS NOT BEEN DENIED.

On or about January 15, 1976, the petitioner received notice from the respondent that as a result of an audit, the sales taxes, interest and negligence penalties were being assessed. A protest of the assessment, including the penalties, was heard by the respondent under the administrative procedure provided by state law. On August 12, 1976, an Order denying the protest was issued. Thereafter, a

revision of the amount of the assessment, including penalties, was made and on December 30, 1976, petitioner paid the taxes, interest and penalties under protest and pursuant to statutes providing for refund claims, brought this action.

The action was instituted in the Court of Common Pleas where all issues joined in the pleadings were heard. Petitioner there was given the opportunity to argue the grounds relied upon in support of the claim and present testimony and evidence. The State Supreme Court, on an appeal filed by the respondent, reversed the findings and order of the lower court with regard to the claim and held that the taxes, interest and penalties were properly assessed.

In the appeal to the Supreme Court, the petitioner filed additional sustaining grounds, one of which related to the penalty. The Court expressly relying upon the additional grounds said:

"ARA has submitted to the court three additional sustaining grounds. The case was tried by the lower court on stipulations which are included in the record before us. A careful examination of the stipulations convinces us that the lower court would not have been justified in granting relief to ARA on the basis of any of the sustaining grounds enumerated." (Page 6-A of Petition)

Boddie v. Connecticut, 401 U. S. 377 (1971), held that due process of law requires that persons must be given a meaningful opportunity to be heard. Petitioner's protest, as the record shows, was heard at the administrative level, in the Court of Common Pleas and in the Supreme Court. Before all three, the liability for the penalty was in issue. Having afforded the petitioner the right to be heard, the rule of *Boddie* and the other cases cited in *Boddie* has been clearly met.

Upon a conclusion by this Court that due process requirements have been satisfied, respondent submits that there is no federal question which would require the attention of this Court.

CONCLUSION

Based upon the reasons set forth herein, respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

August 7, 1956

(Sales and Use Taxes — Exemption. — The question of Whether the United States is required to pay for supplies procured in a state at a price inclusive of the sales tax imposed by the state rests upon a determination of whether the incidence of the tax is on the vendor or the vendee. When the tax is imposed on the vendor, as in South Carolina, the United States is not immune from taxation.)

* * * * *

"Reference is made to your letter of July 11, 1956, transmitting a certified invoice in favor of the *** Company, Incorporated, Post Office Box ***, Columbia, South Carolina, covering an open market purchase of supplies in South Carolina. The invoice is in the amount of \$13.60, including the South Carolina sales tax, which amounts to 40 cents. Attached to the invoice are copies of letters dated April 19, 1956, from the South Carolina Tax Commission to two Forest Service installations in South Carolina advising such installations that the Commission had determined that the State sales tax "is a vendor type tax as distinguished from a vendee type tax" and that, hence, the vendor is required to pay the tax to the State on sales to the Federal Government. You request a decision as to whether you may certify the full amount of the invoice for payment, including the South Carolina sales tax, without following the procedure described in 19 Comp. Gen. 1002, in view of the ruling of the South Carolina Tax Commission.

In 19 Comp. Gen. 1002 it was held, quoting the syllabus, as follows:

"Where necessity requires the purchase of gasoline in the open market in North Dakota and the vendor refuses to sell at a price exclusive of the State tax, payment may be made at the vendor's price if he furnishes an appropriate certificate showing the amount of the tax so paid on the purchase, such certificates to be promptly trans-

mitted to this office for use in obtaining reimbursement from the State for the amount of the tax. 19 Comp. Gen. 822, id. 909, amplified."

The procedure set forth in that decision is not for application where the legal incidence of a State tax is found to be on the vendor. See 21 Comp. Gen. 843 and 24 Comp. Gen. 150.

Concerning the payment of State sales taxes generally, our office has held that the question of whether the United States is required to pay for supplies procured in a State at a price inclusive of the sales tax imposed by the State rests upon a determination of whether the incidence of the tax is on the vendor or on the vendee. Where the incidence of the tax is on the vendor, the United States has no right—apart from State statutory regulations promulgated thereunder by State authorities—to purchase supplies within the territorial jurisdiction of the State on a tax free basis. See Alabama v. King and Boozer, 314 U. S. 1, and 24 Comp. Gen. 150. On the other hand, where the incidence of the tax is on the vendee, the United States in purchasing supplies for official use is entitled under its constitutional prerogative to make purchases free from State taxes and to recover any amount of such taxes which may have been paid by it. See 33 Comp. Gen. 453.

The sales tax law of South Carolina appears in Section 65-1401 to 65-1411 of the 1952 Code of that State, as amended. Section 65-1401 imposes upon every person engaged or continuing within the State in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, a tax equal to three percent of the gross proceeds of sales of the business. Section 65-1407 provides in effect that the vendor may add to the sales price the amount of the tax. Section 65-1409 provides that the failure to pass the tax on to the purchaser shall in no way relieve the vendor from paying the tax.

It is obvious from the above-cited provisions of South Carolina Law that the tax in question is a tax on the vendor.

Although under Section 65-1407 the vendor may pass on the tax to the vendee, this is not mandatory and the vendor's failure to do so does not affect his liability for the tax. Thus, it is clear that the legal incidence of the tax is on the vendor rather than the purchaser, and consequently, the constitutional principle under which the Federal Government is immune to State taxation is not for application here. See Esso Standard Oil Company v. Evans, 345 U. S. 495, and 24 Comp. Gen. 150.

In view of the foregoing you are advised that the invoice in question may be certified for payment in the full amount, provided it is determined that the vendor involved here regularly sells to the general public at the specified price plus a charge for "tax." However, there would be no necessity for following the procedure described in 19 Comp. Gen. 1002, since the legal incidence of the tax is not on the vendee.

The Invoice is returned herewith."

APPENDIX B

**SECTION 15.(b) Section 65-1407, 1952 Code, amended
—additions to sales price made permissive instead of mandatory.—**

(b) Section 1407, of Chapter 15, of Title 65, Code of Laws for 1952, is hereby amended by striking out all of the first paragraph of said Section and inserting in lieu thereof the following:

"Every person or company engaged in or continuing within this State in a business for which a license or privilege tax is required by this Article, may add to the sales price the following:"

so that said Section, when so amended, shall read as follows:

Section 1407. Every person or company engaged in or continuing within this State in a business for which a license or privilege tax is required by this Article, may add to the sales price the following:

- (1) No amount on sales of ten cents or less;
- (2) One cent on sales of eleven cents and over, but not in excess of thirty-five cents;
- (3) Two cents on sales of thirty-six cents and over, but not in excess of sixty-five cents;
- (4) Three cents on sales of sixty-six cents and over, but not in excess of one dollar; and
- (5) One cent additional for each thirty-three cents or major fraction thereof in excess of one dollar.

But in no case shall the amount to be added to the sales price of any single article exceed the following sums:

- (1) Twenty-five dollars on any article the sales price of which does not exceed fifteen hundred dollars;
- (2) Forty dollars on any article the sales price of which is above fifteen hundred dollars but not exceeding three thousand dollars; and
- (3) Seventy-five dollars on any article the sales price of which exceeds three thousand dollars."